

STATE OF MICHIGAN
COURT OF APPEALS

HERTZ, SCHRAM & SARETSKY,

Plaintiff-Appellee,

v

DEAN C. TURNER,

Defendant-Appellant.

UNPUBLISHED

January 20, 2004

No. 239176

Oakland Circuit Court

LC No. 01-033255-CK

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM

Defendant appeals by leave granted the order denying his motion to set aside default judgment. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed its complaint on July 16, 2001. Service on defendant was accomplished by posting. On September 27, 2001,¹ defendant filed with the court clerk an answer to the complaint, affirmative defenses, a demand for trial by jury and an affidavit verifying the contents of the answer. MCR 2.107(G). Defendant also filed a proof of service.

The lower court record contains a time-stamped original of these pleadings. The answer, affirmative defenses, jury demand and affidavit total six pages which are stapled together and numbered consecutively. The first page is entitled "Request for Jury Trial." The time-stamp on the six-page document initialed by a deputy clerk clearly verifies that the pleadings were timely filed.

However, as reflected by the docket sheets, the deputy clerk only made a docket entry for the jury demand. For whatever reason, most likely mere oversight, the clerk neglected to enter the answer, affirmative defenses, affidavit and proof of service. The record also contains

¹ It is uncontested that the filing date was well within the time period for answering the complaint.

assertions, but no documentation, that the court clerk cashed the check defendant used to pay for his jury demand.

Despite defendant's filing of a timely answer, the trial court issued a computer generated order that plaintiff appear on October 17, 2001, to show cause why it "failed to request the clerk to enter the default of the defendant" It appears that this computer-generated order was issued because the deputy clerk neglected to make docket entries of the answer, affirmative defenses and proof of service. Consequently, plaintiff filed a request for entry of default on October 17, 2001, based on defendant's "failure to appear." On October 22, 2001, the trial court entered default and granted judgment in favor of plaintiff for over \$300,000.

A ruling on a motion to set aside a default judgment is entrusted to the discretion of the trial court, and will not be reversed absent a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Upon review of the record, we find that the trial court abused its discretion in failing to set aside the default and default judgment.

Although the trial court utilized the correct procedure for setting aside a default judgment, here, the default procedure was improperly invoked because defendant's answer was timely filed. As our Supreme Court noted:

. . . although the law favors the determination of claims on the merits, . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been *properly* entered. [Citations omitted and emphasis added.] *Id.* at 229.

In this case, default was *improperly* entered – based on the court clerk's failure to enter the answer and affirmative defenses on the computer system. Defendant moved to set aside the default and default judgment, asserting that he filed a timely answer to the complaint and so made an appearance. In support, he produced a time-stamped copy of the answer, showing that it was filed and received by the court clerk on September 27, 2001. When defendant alerted the trial court of this fact, the trial court should have set aside default and default judgment and permitted the action to proceed on the merits. MCR 2.612. Instead, the court stated that it would only set aside the judgment if defendant filed an affidavit sufficient to establish a meritorious defense. After defendant filed his affidavit, the court denied the motion, finding that defendant failed to state a good cause for his failure to timely respond, and the affidavit did not state sufficient facts to show a meritorious defense. This was a clear abuse of discretion. *Id.* at 227. Defendant did not fail to timely respond. The default was entered in error – an error not of defendant's making or within his control.

Even if the procedure to set aside the default was properly invoked, the default should have been set aside. Pursuant to MCR 2.603(D)(1), a party must demonstrate both good cause and a meritorious defense in order to set aside a default judgment. Good cause and a meritorious defense are separate and distinct requirements, and a moving party must establish both factors to prevail. *Id.* at 233. These hurdles were clearly surmounted in this case.

The fact that defendant filed a timely answer is certainly good cause for setting aside the default. Moreover, the affirmative defenses and verified answer to the complaint, if shown at

trial to be true, would constitute a complete defense to the complaint. Defendant's affidavit of meritorious defense filed in the trial court states more than "a general conclusory denial of liability." *Novi Construction, Inc v Triangle Excavating Co*, 102 Mich App 586, 590; 302 NW2d 244 (1980). Interest on the alleged unpaid attorneys fees represents a significant portion of the judgment, and defendant denies that interest was to be assessed on unpaid bills. He also contests the accuracy of the billing and whether certain items were "quadrupled billed." Under the facts of this case, this constitutes a meritorious defense when taken together with defendant's answer and affirmative defenses.

Moreover, "manifest injustice" would result from permitting this default judgment to stand. *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998). As this Court has previously explained:

Manifest injustice is *not* a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense. Rather, it is the result that would occur if a default were not set aside where a party has satisfied the "good cause" and "meritorious defense" requirements of the court rule. [*Barclay v Crown Building & Development, Inc*, 241 Mich App 639; 617 NW2d 373 (2000) (citations omitted).]

It is "manifest injustice" to hold a defendant liable on a judgment of over \$300,000 simply because a court clerk failed to make proper docket entries. The trial court abused its discretion in not setting aside the default and default judgment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly